Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1979

No. 79-134

Consolidated Edison Company of New York, Inc.,

Appellant,

v.

Public Service Commission of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION OF NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Appellant opposes the New York State Consumer Protection Board's (CPB) motion for leave to file a brief *amicus curiae* on the grounds the CPB " . . . has no statutory authority to file an *amicus* brief in this appeal." Appellant's Brief in Opposition, p. 1. The appellant relies on the decision in *Pooler v. Public Service Commission* 58 A.D. 2d 940 (3d Dept. 1977), *aff'd*, 43 N.Y. 2d 750 (1977), for the proposition that the CPB does not have the authority to participate in judicial proceedings to review decisions of the Public Service Commission (PSC). However, the *Pooler* case only concerned the capacity of the CPB to commence a review proceeding; it did not prevent the CPB from participating in judicial cases in other ways, such as by filing briefs *amicus curiae*. *Pooler*, supra at 940.

Appellant also recognizes that the Board now has the authority to initiate judicial review of Public Service Commission decisions involving utility rates. 1978 N.Y. laws, Ch. 120. Appellant submits, however, that this appeal does not

involve rates. Contrary to appellant's contention, the PSC order that is the subject of this appeal makes it clear that it involves utility rates. The PSC found that " . . . it is basically unfair to assess against ratepayers the cost of advertisements urging the adoption of positions with which they may disagree. Therefore, we will no longer sanction the use of sums provided by ratepayers to advance one side of a public controversy." Appellant's J.S. App. 42a - 43a; also see appellant's J.S. App. 67a.

Even assuming, *arguendo*, that the CPB does not have the power to initiate this appeal, appellant's objection must be rejected. This Court previously has permitted a government agency to be heard as a friend of the Court even though no law existed expressly authorizing the agency to participate as a formal party. *The Employers' Liability Cases* 207 U.S. 463 (1908); see also *United States v. Massachusetts Maritime Academy* 76 F.R.D. 595 (U.S. D.C. Mass., 1977); 4 Am Jur 2d 110.

Therefore, the CPB respectfully requests that its motion to file an amicus brief in this case be granted.

Respectfully submitted,

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